

An Ethnology of the Criminal Defense File*

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Abstract

In my essay I examine a criminal defense file as a cultural object, an artefact that gathers together various written documents toward making a case. In my examination I employ rhetorical ethnography of communication. Suggested by Thomas Farrell and Tamar Katriel, the method was originally applied to the analysis of scrapbooks presented as cultural texts of identity. The temporal and spatial analysis of scrapbooking combined with the accounts received from the informants revealed that scrapbooks had distinct principles of aesthetic organization; rhetorically, they were close kin of epideictic discourse. Drawing an analogy between the legal file to the scrapbook allowed me to show how specific activities (saving; organizing; sharing) expose a culturally choreographed way of self and law-making. On the basis of these findings, I define the legal file to be a sermonic text, whose identity is accumulative, distributive, and self-disclosive.

Key words: scrapbook, act-object, living text, criminal defense, legal file, sermonic

1. The Legal File: An Object of Utmost Obscurity

The legal file is a banal object. And a wondrous thing it is. There is no logical contradiction for these two statements: as this essay aspires to demonstrate, as dull as it appears to be, the place of institutional record keeping is a dwelling place for wonder. In addition, as a legal phenomenon, the file is necessarily consequential. It is a part of the legal process; it reflects and it guides it; it is designed in accordance with certain rules and procedures; its execution therefore is a sanctionable matter. Banal, important, and wondrous, the legal file warrants if not demands a close examination. I would like to begin this examination by asking a question, *What kind of a creature is legal file?* From the first appearance, the file is a collector for relevant texts and documents (Barry, 1972: 12). In other words, it is an archive. The archival properties of filing define its purposes in memorizing and in that sense, in historicizing the matters it accepts. This capacity, problematic in itself, becomes particularly so once archive enters in a relationship with law, becomes legalized, so to speak. Suspicious as a collector, in the legal realm the archive is a maker of ambiguous truths: archived testimonials blend “the

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truth and the imagined substance into the zone of indistinction,” making it impossible to understand the position of the subject before law (Agamben, 2002: 120). In secret, the archive is also the maker of laws: “the archontic principle of the archive presupposes not the originary *arche* but the nomological arche of the law, of institution, of domiciliation, of domestication” (Derrida, 1996: 95). Tending toward universality, law requires localization, nominalization, singularity. Before Derrida and Agamben, it was Michel Foucault, who discovered paradoxality of law in its auto-generativity, the ability for law of distilling itself from justice in discourse and then let this discourse perpetuate itself as justice. Understanding the archive then means to understand its historical *apriori*, that is, “the conditions for reality of statements” (Foucault, 1972: 127).

The philosophically-minded sociological scholarship assumes various perspectives on law, archive and their paradoxality. A legacy of Foucault’s exposures, the critical perspective tends to emphasize the insipid nature of archives; their inescapable grip on our daily affairs. For example, Manoff explicitly critiques those academics who get engaged in the study of archives unawares that by examining archives they generate more archives (2004: 21). Osborne too argues that “archival reasoning remains” to define contemporary scholarship and with, it, the production of oppressive ideologies (1992: 59). He claims that an examination of this reasoning is morally necessary, for it continues to function in contemporary history-making practices. In an empirical grounding of the critical vein, Lynch and Bogen actually show how these practices can be constructed at the Senate Committee Hearings of the Iran Contra Affairs, where history was being made “by engaging the methods designed for detecting facts and interpretative evidence in spoken testimony and memoranda for telling the truth and telling whether a truth has been told” (1996: 263).

Lynch and Bogen belong to the ethnomethodological tradition that produced a sizable empirical research dedicated to examining the relationship between the documented rules and the documenting activities (e.g., Garfinkel, 1967; Raffel, 1979; Travers, 1995, Lynch, 1996,

1999, 2002; Martinez, 2006; Halldorsdottir, 2006). For the above scholars, the file is not just the record or archive, but, according to Lynch, “the living text” (2002: 128). This co-determinate praxiology helps us identify the legal file as a social object, or text. Another word for the living text is act-object. Alfred Schutz states that an act-object as what can be interpreted only “according to schemes not adequate to the object itself but to those belonging to other objects” (1970: 4). A participant in a wide range of relations—communications with the client, clerk of courts, prosecutor, law firm—the file is a *relational* object. It also has an intrinsic connection to other files and their records that feed it and which are fed by it. At the same time, at all times, in fact, the file is a material object. Thus, as an act-object the file is formed at the juncture of two elementals: materiality and what it stands for, an action, or, to be more precise, a transaction. As an act-object, the file reflects a specific social economy of law. In this economy, the file has a multi-modal way of existence: it is an object and a story, and it is also a case, which often begins with but exceeds the story of its making.

Recognizing the complexity of the archive’s relationship to law and appreciating its social consequences, I would like to continue investigating the legal archive from the micro-sociological perspective as “the living text,” which is both a passive recipient of information and an active contributor to action. It also assigns it to a class of similar objects that, together with personnel and medical files, form the category of folder records, or “interactionally administered document” (Lynch, 2002: 131). *How shall we examine that kind of a social object?* I suggest that we do it by extending the earlier analogy between the scrapbook and the file into an ethnological analysis. For the method capable of framing this kind of analysis, I propose rhetorical ethnography of communication. A specific example of this method, which explores a paper object as a cultural artefact, can be found in Thomas Farrell and Tamar Katriel’s essay “Scrapbooks as Cultural Texts.” In the next section, I would like to elaborate on the Farrell-Katriel approach, for it is in its finely tuned mechanics that I find the analytical frame for examining the legal file as a social text.

2. On Method: Rhetorical Ethnography of Communication

The authors define their task as presenting “an account of scrapbook making and using as an American art of memory and as a rhetorical practice of constitution and performance of self” (1991: 2). The key insights of the Farrell-Katriel study form a rule-performance continuum; this is to say that the rules of making a cultural artefact reflect the possibilities for its subsequent performance; hence the continuum. The authors begin their research by constructing a general typology of scrapbooks: grade-school, camp, travel, family. All these types form a category on account of a specific spatial and temporal structure; mostly chronological, scrapbooks are such inconsistently so, as their narratives are being shaped in accordance with the direction and the force of the rhetorical performance rather than a linear representation of one’s life. The materials used for the construction of the scrapbook range from photographs, to stickers, cut-outs, tickets, pieces of clothing, letter pages, paper clippings, postcards, and, finally, craftily made in-the-text notes.ⁱ Depending on their assembly, these materials allow for a variety of genres, e.g., comical, melodramatic, heroic. As one of my informants elaborated, “I want as much flexibility in how I tell the story as possible. So, I try not to overdo my pages. This way I can build up on what I show any way I want.”ⁱⁱ However, argue the authors, most genres of telling as showing and showing as telling fit the umbrella genre of epideictic discourse, a form of oratory intended to celebrate one’s life.

Like any other genre, the celebratory discourse is ritualistic in both its forms and modes of enactment. In order to be recognized as a cultural practice, scrapbooking must “respect certain recognizable rules and techniques of presentation” (Katriel and Farrell, 1991: 4). Three key activities are found to be definitional for the process of scrapbooking: saving, organizing, contemplating, and sharing. For the activity of saving, the rule prescribes that the scrapbook’s author should select the so-called “perfect” moments of one’s life, save them to memory and then attach them to a specific, for the purposes of inclusion, artefact, such as a

picture, or note. This metonymic assemblage of one's self shows his/her life and his/her family as a happy becoming, whether happiness has indeed been achieved, and experienced, or just imagined and/or hoped for. The celebratory rhetoric is always hope-inclusive. Importantly, the kind of self or life that scrapbooking constructs and performs is distinctly social.

Although originally intended for private use, scrapbooks presume a mixed audience: on the one hand, it is certainly enjoyable to re-experience the past events with friends and family; on the other hand, the same activity done with a stranger presupposes a different kind of storytelling. There, the teller experiences not just the past and the re-telling of it, but the creative impulse that comes with the alteration of the story toward various hyperbolizations, embellishments, and omissions. In this case, cultural “performatives” are intended to subvert reality rather than serve it. And yet, although the ways to tell a story range widely, the possible worlds that deserve the storyteller's attention are limited: not all the seasons of life are embraced with equal attention; a clear preference is given to such action-oriented life stages as childhood and adolescence. As my informant put it, “later in life there is really little that you want to show to other people.” When organizing their life accounts, take time to figure out if and how a particular item fits this or that thematic environment, and since that environment is predominantly visual, organization of imagery is very important; and certain principles apply: a) collages must be chronologically coordinated; b) they must display a coherent colour scheme; c) they must speak for themselves as individual items, without, however, destroying the grouping.ⁱⁱⁱ

I sometimes put just a photo on a page and let it speak for itself. Once I found a beautiful mask at a street carnival. I just saw it in to the page. But a lot of times, I want the whole page to speak a story. Most people are not patient enough to go through the entire scrapbook, so you must have those ‘prima’ pages that must be ready [...] to show to your guests. But sometimes you go through the entire book. If it is well done, your guest might want to see all of it. I love those moments when they ask for more. It is like the best praise a ‘scrappie’ can get (From an interview with Selma B., a member of the Mound City Scrapbooking Club, OI:12/07/04-26).

One additional technique helps transition from image to text: a lot of times, a written commentary accompanies the collage.^{iv} The purpose of these write-ups is linkage; they clarify the relations among various pieces and also provide narratives with a contextual frame. From my personal experience, when Tamra was showing me her scrapbook, she would read these commentaries and then comment on them. For example, on the page next to a photograph of Linda at the age of three there would be written with a gel pen, 'I like ox' and then Tamra would say, "this is what Linda used to call all the animals 'ox.'" Depending on the organizational specifics of this or that scrapbook, it falls more or less on one pole of the private-public continuum defined by the preferred use: either for private use, for memory sake, or for social bonding, a breaking in a new person into the social group. In addition to revelling in the memorable achievements, scrapbooks have a strong therapeutic effect; the futural component engages imagination and may provoke reconsideration of the basics in one's life.

In sum, concluding with Katriel and Farrell, scrapbooks are "portable secular rituals" (1991: 14). As such, they integrate various facets of a person's life in an orderly but not altogether linear fashion. Their purposes include reflections and meditations that unify "shards" and "by-products" of one's developing character. In this way, they link the private with the public and the personal with the communal, intertwining, at the same time, the life as lived with the life as imagined, constructing an identity that may deviate from and even contradict the experiences of others.

For the subsequent analysis, I follow the original synthesis of ethnography of communication with rhetoric, but in a particular, ethnomethodological configuration. Specifically, I lean in on Harold Garfinkel's insights that arise out of his studying the difference between everyday decision-making and judicial decision-making. Among his findings is the foundational status of the everyday practice. For a juror, the everyday life comes into conflict with the institutional context when an ordinary dweller is called upon to

modify the habitual normative order in order to accommodate its court-room inflection. He/she manages the conflict by aligning the two modes of being and thus the two kinds of practices and a locally designed practice, or “practice for all practical purposes” (1967: 24). Likewise, good archives are made badly when their actual makers adjust the rules to the actualities of their existence. From these experiences we deduce ethnomethods or locally constituted ways of mobilizing the everyday that lends itself for an adjustment brought about by a particular social task. I therefore propose that we investigate the relationship between scrapbooking and legal filing as a relationship in which legal filing exploits the same basic resources as are deployed for scrapbooking.

When applied to the analysis of the criminal file, this methodological fusion helps examine the criminal file as an aesthetic form that participates in the process of legal normalization in three different aspects: cultural, textual, and rhetorical. Specifically, I focus on the temporal and spatial organization of the file, culturally-specific rules of its organization and use, as well as its performative aspects.^v Before I proceed with my analysis, I would like to briefly describe the site of my fieldwork and the data that I collected there.

3. On Ethnographic Fieldwork and Legal Files

I conducted my legal fieldwork in a small private law firm, “Dorman, Tucker and Tucker” located in a small town in one of the Northwestern states.^{vi} The firm consisted of three attorneys: Jack Dorman, my principal informant, and Tom and Frank Tucker, a father and a son, the original founders of the firm. The focus of my research was criminal casework; more specifically, I was interested in those pre-trial practices that participate in producing certain kinds of procedural outcomes, e.g., toward dismissal, toward trial, and toward plea-bargain. Since most cases at the firm ended up on the plea-bargaining table, I spent little time in court and more time in the firm observing my attorney conferencing and case-working or examining legal files (both criminal and civil). At first, I avoided legal files. They seemed to be redundant, technical, and somewhat irrelevant to the defendant’s plight. Documented

exchanges between the involved parties, legal bills, side records, such as police and medical records, transcripts of depositions, affidavits, all that legal pulp fiction seemed to exist only to complicate matters. Not surprisingly, my first impression about the defense file was not much different from the mundane one: I thought of the file as an archive and an evidentiary platform for attacking the prosecution case.

However, with time, by reading through the files more carefully, and, more importantly, viewing them as intrinsic to other defense practices and most importantly to the defendants, I began to realize that defense files are much more intricate, important, and cunning than they appeared at first sight.^{vii} A closer examination brought into relief the file as a nexus for a complex network of relations, a crossroads for different legal practices, actions, and institutions.^{viii} The file organized these relations into a coherent and purposive text. In light of these insights I would like to present a general overview of those files that I had an opportunity of examining during my sojourn at “Dorman, Tucker and Tucker.” My focus for this examination is plain albeit manifold: identify the “scraps” that go into creating a criminal file, single out culture-specific rules of their organization and composition, and note the rhetorical forces that motivate and accompany these activities.

4. Who Is the Author?

In the Katriel-Farrell study, a scrapbook is defined as a “text of identity” constructed by the person him or herself. I find it convenient to begin from the same point: with the issue of authorship. The question that interests me here is: *Who is the author of the criminal file?* In the U.S. legal context, answering these questions proves difficult: due to the oppositional relationship of the two sides, one shall look in vain for a single author.^{ix} Unsurprisingly, one will not discover one file either. There is rather a multiplicity of files that come to comprise a case and, to a various degree, participate in its enactment. Most basically, there are the defense file, the prosecution file, the police (and/or the FBI, Border Patrol, IRS) file and, under special circumstances, the court file. All these files may relate to the same defendant as

their subject matter; yet, the defendant never participates in authoring any of these files directly. At the same time, the defendant is always the subject of the file, albeit not always its only or primary character. Before the file begins in the law firm, the defendant encounters law in the face of the arresting officer, and so it is the police who commonly begin the case. The police report may bear the client's signature and feature his or her statement; yet, it is the arresting officer who composes and thus authors the report. In this respect, the criminal file as a collection of individual documents does not begin with the prosecution. More importantly for this study, the client does not begin the defense file either, for the first document in his or her file is produced by the Attorney:

When the attorney has an initial contact with the client, whether it be by telephone or in person in his office, he writes up an "intake sheet". The intake sheet is generally just a yellow tablet page where he writes the client's name, address, phone numbers, birthdate, social security number (if we'll need it for the case) - any other information that we might need, such as parents', spouse's or girlfriend's names, addresses and contact numbers (most of our criminals are guys!), and then a short synopsis of what has occurred in the case, generally per the client's version of the story. After the client agrees to pay for the attorney's services and signs the contract with him, the attorney brings that intake sheet to me to make a file (From the Interview with Sarah, the Legal Secretary at Dorman, Tucker and Tucker, ORI: 24/06/04-36)

At the same time, by signing the Power of Attorney and the Contract, the client "okays" the making of the file in his name. Later, she might participate in obtaining evidence (usually by way of affidavits), but is excluded from creating a file in terms of organizing and/or presenting it.^x The closest she comes to the traditional understanding of authorship is through his or her testimony in court, which, for the file, would count as a "late" entry. Therefore, the primary authors are those bodies that collect, share, organize, and perform the defendant's criminal identity by documenting it in legally specific ways: the officers of law, officers of the court, and the defense counsel. These multiple authors and their numerous documents relate to each other through the judicial process; they feed, modify, and challenge the case. They do it gradually and in a much rehearsed manner: the police enters the scene, creating the first record as well as linking it to the perpetrator by checking on his/her pre-existent record; the

prosecution follows suit by accepting or rejecting the police record for a possible case; the defense joins in at a later stage at the point suggested by the prosecution; finally, the judicial judgment caps the process by solidifying, so to speak, the work of the previous three actors in a uniquely distinct yet familiar legal product.^{xi} This highly orchestrated process makes the procedural rules the primary author, albeit abstract and disembodied one, for any case and its files. One empirical indication of the primacy of the rule lies in the fact that the case can be rejected even after the Power of Attorney is signed if a conflict of interest is found. The search for a possible conflict is automatic. This is how the Secretary describes it:

It is important to establish upfront if we are going to accept the client. Therefore, at the same time as I type a label, I list the same information on a 'Current Files' list for the month. This is a list that is kept and maintained, per the State Bar Association Rules, for purposes of avoiding conflict of interest cases. We are supposed to refer to this list on a regular basis for that purpose, but in our small office, although we keep the list we usually know if a person involved in a particular case has been a client, or opposing party in the past (From the Interview with Sarah, the Legal Secretary at Dorman, Tucker and Tucker, ORI: 24/06/04-36)

Legal ethics is pragmatic: it is governed by the legal procedure. Returning to the issue of authorship, it is noteworthy that not all kinds of criminal files and therefore authorships are created to be equal: Since under the common law the burden of proof falls on the prosecution, its file and by default the defense's file form the two main sides of criminal casework. The police records and the court motions punctuate the process, no doubt; however, their work in making a criminal identity is either already done or yet to be done. The two remaining players stay in throughout the entire process co-determining each other's actions by virtue of their opposite objectives but not, necessarily, practices and organizations. Still, the relationship between the prosecution and defense is not symmetrical: the legal initiative that comes from the prosecution gives the State Attorney the right of confidential ownership to all investigative materials prior to their disclosure and transfer to the defense in accordance to the Jencks Act.^{xii} Only admissible evidence gets operationalized.

On the strength of these materials, prosecution builds its case and then presents it in court for the judicial approval. Once approved, it becomes the basis for the charge. The charge sets the judicial process in motion. We might therefore say that the prosecuting side (including law enforcement) constitutes the original voice or text for the multi-vocal multi-textual case. They are these textual voices that open the door for the defense to enter. However, as in the case of prosecution, the defense file is officiated only after the court “stipulates” its authorship in the person of a defense attorney. So, the court’s mediation of sorts is crucial for either file to see the light of day. Granted, important differences apply. In contrast to the prosecution that chooses the defendant’s criminal identity on the basis of the evidence, the defense starts its case on the basis of the personal narrative.

This very point of departure, in combination with the representational nature of the attorney-client relationship, availability of the materials to the defendant, negotiability of legal tactics and presentational formats translate into the defense file being the primary file. It is simultaneously a birthplace for the criminal identity and its placement in the form of the intook information and the following extended narrative on a legal map at large. The purpose of this map is to connect the defendant’s ordinary life with the judicial world. If one is to draw an imaginary boundary between the ordinary and the legal spheres, he/she will soon find out that the defense file never settles inside the sphere of criminal legality completely; in creating the file, the attorney always holds a larger audience in mind, whether this audience is actually comprised by the defendant alone or his/her family, or, in the extreme turn of events, would include political representatives and mass media. This makes the function of the defense file much more ambiguous than a mundane view tends to prescribe to it. At the same time, the appearance of the file would resist this characterization. Its “face” is rather plain, as is its initial construction:

First, I type a file label - These are done alphabetically by last name, therefore, the label will say ‘DOE, John,’ and the next line will say ‘Fed. Crim.’ or a simple reference to the charges, as in ‘DUI;’ ‘Rape;’ ‘Burglary,’ or whatever, as long as the

crime is simple to type in a small space. Otherwise, it may just say 'Criminal.' These labels are white with a colored stripe across the top. We don't have a color code, such as red stripe for criminal, blue for domestic, green for estate work, etc. I have fun with the stripe colors if I can, such as using a green label for someone named 'Green, James;' or a yellow label for someone named 'Yellow Jacket, Garret;' or 'Black Bear, Burt,' or 'Brown Spider, Harry.' There is no particular color to use for any particular file, just not a plain white label because the attorney doesn't like them to be plain white. I place the label on the file tab, then punch holes in the top of both sides of the folder. I then place metal prong bases in each set of holes, to hold any papers, correspondence and pleadings in place. Thus, the actual file is constructed (From an Interview with the Sarah, Legal Secretary at Tucker, Dorman and Dorman, ORI: 24/06/04-36)

Given this description, it is little wonder that, mundanely, we see the defense file as a documented evidence of the attorney's casework, a helpful mnemonic tool that saves to paper what otherwise could have been stored in the attorney's memory. It therefore appears to be first and foremost a record. Although it might indeed appear to be so in a historical retrospect, in fact, the defense's file is not just a collector of needful documents. To undertake the historical perspective means to approach the document statically, which is but one perspective. The dynamic view places the defendant on the criminal map in such a way as to insure that the relationship between the social world and the criminal world remains as widely open as possible. This liminal space is needed for the defense to negotiate what will become of the defendant's home, an outcome that is "as good for the defendant as possible," as my informant phrased it. Simultaneously, legal filing incorporates ordinary methods. One of these methods corresponds to the ordinary practice of compiling a text of the self in a scrapbook. In the next section, I would like to further explore this connection.

5. The Defense File: Activities, and Functions

In contrast to the scrapbook, the self-made text of self-identity, the defense file is the other-made text of other-identity. Its dispersed authorship and its law-bound purpose bring about a particular kind of organization, activities, and functions. As I have already mentioned, the defense work begins with the client's story. Consequently, if we disregard the role of the intake sheet, which may or may not make it to the file (the attorney replicates it informally in

his notes in front of the client), the inaugural document of the defense file is usually a set of notes taken by the attorney from the client about “what happened.” However, it is from this point that the defense begins to manage the case. A typical inaugural action (motion) within this frame is a call to the prosecution for evidence. Importantly, not all the evidence is going to make it to the defense side right away. There are two reasons for this: a) strategic selection and b) on-going investigation. Since the prosecution is not required to disclose working materials, certain important clues may be withheld. On the other hand, if the prosecution continues its investigation, there is a chance that the worst kind of evidence will arrive at a later point.^{xiii}

Initially, the defense obtains a standard package. For example, in DWI cases, this package includes the video tape, the police report, the violation ticket, the blood test, and, if the arrestee is brought to jail, the booking tape. While the defense examines the retroactively obtained incriminating evidence, the file does not lie dormant: the examination results in selecting some pieces of evidence over others; the former forms a response and a strategy that falls into one of the three general trajectories: toward dismissal, toward trial, and toward plea-bargain. The three paths are culture specific. The selected path will determine the exact meaning of the most basic activities that contribute to the construction of the defense file: *collecting, selecting, organizing, distributing, and performing*. These activities seem to be similar to those of scrapbooking; indeed, they may characterize a large category of social events, so it is what, how and to what purposes the agents collect, select, organize, distribute and perform their matters that is going to distinguish one text from another and the file from scrapbook, for example.

At the initial stage, there are various “scraps” that make it to various files. What materials are included and what are excluded depends “on their relevance,” in the words of my vis-à-vis. The master rule for the file’s composition, the rule of relevance establishes a functional frame for filing. Three types of relevance inform the file explicitly. I will list them

in the order of importance: a) relevance to the criminal order (“we need to show that we do what we are supposed to do”); b) relevance to the criminal case (“one can not just sit there, he has to act”); c) relevance to the facts (“there is no way one can ignore the evidence”). From the defendant’s perspective, all the defense files start from the same point: legal representation demands that the attorney should take the defendant’s story. The first interview therefore establishes a line of communication between the attorney and the client.^{xiv} It is usually accompanied by the aforementioned assignment notification that makes the attorney’s counsel official and, in turn, opens communication channels with the State Attorney and the Court Clerk.

The need to communicate defines another kind of basic activity for making a defense file, *distributing* or *sharing*. Communication relevant records therefore end up comprising a good deal of the defense file. All kinds of correspondence between and among the three principal and other outside parties bulge through the binder: inquiries, responses, court orders, confirmations, notifications. The key correspondence items are the letters from the attorney to the client (in my experience, the clients rarely write to their attorneys, placing greater emphasis on telephonic exchanges), and the letters from and to the prosecuting attorney. All these “scraps” are selected to relate the parties to the order of criminal proceedings. In that, they perform a *metapragmatic* function. At first sight, it appears that the only active documents in the file, such as police reports, witness interviews, medical tests, prior criminal record, physical evidence, such as video and audio recordings, and photographs, are evidentiary ones. This outlook is deceptive, however. Although evidence plays a role at the early stage, when the attorney and the client discuss a possible course of action on its basis, if the case goes to trial, evidence lays undisturbed until then. The motions, on the other hand, are actively engaged throughout. Unlike the direct effects of evidence, due to their meta-pragmatic function, motions and countermotions affect tacitly by relating the past and future actions to each other, organizing the file’s plot, and, strictly speaking, performing the case

behind the scenes, as it were. United in a cross-referential relationship, they are the proper organs of the file. Moreover, when enacted for a specific purpose, such as asking for a postponement due to illness, or other personal circumstances, they function *pragmatically*. In comparison, communication documents function to disseminate what the pragmatic function has generated. In light of their pragmatic use, all the documents in the file fall accordingly:

“The attorney’s preference is to place pleadings and discovery on the right side of the folder, and correspondence on the left side. Therefore, when you open a file, the heavier section will generally be left flat on the desk top, while the top flap which will be opened is somewhat lighter and less bulky. On the left side of the folder, I place the intake sheet on the bottom, followed by a signed employment contract which the attorney has a client sign at their first meeting. On top of those comes correspondence, placed in the folder chronologically - oldest letters on the bottom, with the newest work on the top. On the right side of the folder we put any pleadings, copies of police tickets, arrest reports, bond papers, power of attorney, and any other discovery we might get from the prosecuting attorney” (From an Interview with the Sarah, Legal Secretary at Tucker, Dorman and Dorman, ORI: 24/06/04-36)

In order to better understand *performing* as a co-constructed activity that is associated with the legal sphere, we need to mention two main types of performance: about trial and about plea-bargain.^{xv} The divergence is not prescribed but enacted. It is also marked by specific kinds of “scraps” that allow an outsider who does not know much about a specific case to say what drama this file is performing. In the case of the file that goes to the trial accumulated will be such materials as lists of witnesses with their ranking, witness depositions, finalized court procedures, expert testimonies, and jury profiles. For the file that selects the plea-bargaining route these materials will be reduced to the plea-bargain agreement and the subsequent negotiations of the sentencing. In such a file we will also find the pre-sentencing report. An investigation of how these trajectories are decided falls out of the realm of this investigation. More important is that the choice of a path with its components does alter the performance of the file by prescribing its rhetorical genre. In the next section, I would like to investigate the rhetorical genres of the defense file.

6. The Defense File: Composition and Rhetoric

The two concepts, composition and rhetoric, are intricately intertwined. Farrell presents rhetoric as a manner of address that “possibilizes persuasion, conviction, action, and judgement” (1993: 16). In this largely Aristotelian formulation, the power of rhetoric lies in its capacity of suspending the established order of things, for example, a particular manner of speaking, or style. Style is then the point where rhetoric and ethnography of communication converge: the style as a cultural way of speaking (toward doing) is illuminated by the style as a way of addressing (toward acting). And, since addressing, in its very basic structure, begins with formulating and posing the question, it illuminates the style of speaking by emphasizing audience and responsivity. By operationalizing these two notions, rhetoric overrides a likely ontological bias of ethnographic findings by inviting “a struggle over the provisional meaning of appearances” (ibid.: 47). The responsibility of rhetoric is to explore these provisional configurations in their enactment, in a style of one’s address. More concretely, Farrell suggests that a rhetorical analysis be guided by certain principles that organize anticipation and participation within appearances. These principles are: competence, performance, coherence, and distance, that is, in order to achieve a certain effect, one, at minimum, needs to know the rules and apply them to a coherent performance with a specific audience in view.

In their analysis of the scrapbook, Farrell and Katriel identify its rhetoric as belonging to the epideictic genre intended to celebrate the self. In contrast, the traditional Aristotelian division into political, ceremonial, and forensic genres of oratory attributes all the debate that unrolls in the court to the forensic discourse. For Aristotle, this type of oratory is characterized by the matters of the past: “one man accuses the other, and the other defends himself, with reference to things already done” (1946: 1157). However, a matter of historical context is in order: for Aristotle, justice happens only in the court and only with the trial. In view of the contemporary fact that trial is an uncommon resolution of the case (even if plea-bargaining involves court deliberations in its last instance), we might want to extend the forensic genre to deliberative discourse. Once again, Aristotle may provide an important

insight here. The relationship between forensic and deliberative rhetoric turns into a temporal continuum; in turn, the absence of break on the temporal continuum signifies the absence of a break on the discourse continuum. The two discourses form an interrelation that unites deliberations, as a matter of future decision-making, with forensics as a matter of past decisions. In this dual function, legal discourse becomes essentially about debating broadens the notion of opposition to negotiation. Both the plea-bargain and the trial files feature not just arguments but negotiable arguments, some to a lesser and others to a greater degree. These arguments are strictly speaking arguables. They are arguables because they refer to an identity, and although they are being nominalized in all sorts of legal objects, such as “charges,” are without the filler. However, the kinds of negotiating are drastically different, so much so as to let us announce the two trajectories, plea-bargain and trial, as non-coincident.

For example, the file that tends toward the trial becomes heavily engaged in preparing. It therefore continues to collect, select, and “train” the materials for the upcoming performance. Training here means rating the witnesses and testing them for possible deviations from their original statements; it also implies adjusting research materials that form and support the defense strategy against counter-materials submitted by the prosecution. Surprise is a major concern for both parties. Sandbagging is a commonly exercised strategy: on the last day of evidence turnover, shortly before the trial, any side may drop new and unexpected evidence that would often force the sandbagged side reformulate the entire pre-conceived strategy. For the sandbagged side, this means shifting foci, dropping pieces of evidence and witnesses, rushing into obtaining new evidence and basically reorganizing the file. When the trial comes, the prepared materials are brought to the stage and made perform by being referenced in the questions asked by the attorneys during cross-examinations, appeals to the judge as to the admissibility of this or that evidence and protecting friendly witnesses from excessive beating from the opposite side. In all these activities, the main

focus rests on the evidence, its origin, validity, and relevance. The rhetorical situation of the trial creates a preference for the trial file to perform both forensically and deliberatively.^{xvi}

The main objective of the plea-bargaining is to make it “as sweet for the accused as possible,” according to my informant, and the way this most acceptable way is obtained is by shifting attention from the facts of the crime to the facts of personal responsibility for the crime. Therefore, in plea-bargaining, the defendant’s criminal identity becomes the primary consideration for the parties. In the post-plea environment, the casework explicitly tends toward the future that belongs solely to the defendant and therefore lies outside of the court’s purview. By assuming that perspective, the tone of the casework and therefore the file changes to testimony. From the rhetorical perspective, testimony is “a serious intimation from another, of any fact or observation, as being what he remembers to have seen or experienced” (Weaver, 1963: 67). Through testimony, particular experiences and circumstances are brought to the fore. Not necessarily constructing the defendant as a better or more credible person, testimony opens the personal realm for the merger with the legal realm. A threshold between the here and then emerges. Viewed from this threshold, the person himself becomes evidence for his constitution.

In other words, instead of being an example of justice as she would have been upon the guilty pronouncement at the end of the trial, she becomes its face, as a disclosure of legal relations. “The difference between testimony and example is this: by example we clarify the nature of our statement, while by testimony we establish its truth” (ibid.: 74). Once the client agreed to assume the guilt for the committed wrongdoing, the truth of the matter is no longer in question; the facts have been established. What is in question is the proof of life, the life of the accused, the future, the ultimate truth. It is in this sense that the plea-bargaining is testimonial, confessional, sermonic. It is in the same sense that, at that stage, the file, too, becomes sermonic. The audiences for the testimony vary; they are the court, that is, the judge and the probation officer who takes the personal information from the accused. The

confession is presented in the form of a specific narrative that comes from various sources but is constructed by the defending attorney and resides in the file. The file therefore always gives a testimony on behalf of someone. It is thus a cultural art of accounting for the truth in matter. It is a portable sacred ritual that engages the present for making the future.

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Notes

ⁱ My own observations also showed that it is the live still, or photograph, that serves as the organizing pivot that pulls all other pieces toward. The significance of the photograph is two-fold: on the one hand, it links the living person to his or her image; on the other hand, it is the most conclusive evidence, something the legal file is expected but does not share with the scrapbook.

ⁱⁱ All the informants cited in this essay were interviewed. Most interviews were audio-recorded and video-taped. Some were shorthanded.

ⁱⁱⁱ This does not mean that there is always consistency, coherence, and aesthetics in every single scrapbook; some scrapbooks look simplistic, uninteresting. However, from my experiences with the Mound City Scrapbookers, scrapbooks are made in accordance with some basic set of rules.

^{iv} So does the attorney, who puts yellow sticker notes next to the documents.

^v By way of clarification, in the context of this study, I understand culture as a specific way of doing, while performance I understand as a way of presenting law-relevant accomplishments.

^{vi} My fieldwork comprised two stages: the first one began in the summer of 2003 and continued in the summer of 2004.

^{vii} On the deceptive ordinariness of archives, see Osborne (1999).

^{viii} Manoff (2004) gives a helpful account of the interdisciplinary lives of the archive. Interdisciplinary in this case includes the distinction between the ordinary and the extra-ordinary or legal.

^{ix} Following the English common law system, the US tries criminal cases in an adversary fashion. For more on the history of adversary criminal trials, see Langbein (2003).

^x The defendant has a limited access only to the defense file; for obvious reasons, the prosecution file is strictly off limits to the defendant. So is the police file, except for the evidentiary part that goes into the prosecution file and then travels, by bits and pieces, into the defense file. The court file (basically, the judge's notes and the research done for or about the case by the assistant to the judge, or probation officer's pre-sentencing report) is available as the basis for the judicial decision presented only at the time of sentencing.

^{xi} One might also want to mention the Department of Corrections that forms a separate entity under the heading of justice. I chose to ignore DC for a technical reason: instigated by the judicial decision, its work is very much "post" the adversarial contest.

^{xii} Under the Jencks Act, "a prosecution witness's written or recorded pre-trial statement a criminal defendant, upon filing a motion after the witness has testified, is entitled to have in preparing to cross-examine the witness."

^{xiii} The notion of "worst" here should be understood only as exhibiting the "best fit" to the original charge.

^{xiv} Self-reference [removed for blind review]

^{xv} Here, I reduce the notion of performing to the entire process of enactment. This reduction is necessitated by technical constraints: as in the case of scrapbooking, a legal item, such as a witness testimony, may perform on its own as well.

^{xvi} The concept of "preference" as I employ it here is structural, not psychological.